

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

STEVEN CRAIN,
 Plaintiff,

vs.

ANDREY PETRUSHKIN, et al.,
 Defendants.

Case No. 2:13-cv-01732-JCM-CWH

ORDER

This matter is before the court on Plaintiff Steven Crain's Renewed Application to Proceed *In Forma Pauperis* (#3), filed October 21, 2013. His initial application (#1) was denied without prejudice because it was incomplete. Plaintiff was instructed to submit a renewed, completed application or pay the filing fee. He submitted the renewed application, which the undersigned has reviewed pursuant to 28 U.S.C. § 1915. The Court finds that Plaintiff is unable to pre-pay the filing fee and his request to proceed *in forma pauperis* is granted.

BACKGROUND

Plaintiff names two defendants in his complaint: (1) Defendant Andrey Petrushkin, an individual residing in Clark County, Nevada, and (2) Defendant Advance Home Services, LLC, also located in Clark County, Nevada. He alleges that he became employed by Advanced Home Services on or about the second week of May, 2013 as a journeyman plumber. On June 4, 2013, approximately one month after he began his employment, he was pulled over while driving a van owned by Defendant Advanced Home Services and ticketed for violation of Nevada Revised Statute 482.545(1).¹ The ticket

¹ NRS 482.545(1) provides that "[i]t is unlawful for any person . . . [t]o operate, or for the owner thereof knowingly to permit the operation of, upon a highway any motor vehicle, trailer or semitrailer which is not

1 imposed a fine of \$1149.00. Plaintiff claims that he “whistle blew” on his employer by informing the
2 ticketing officer that the vehicle was owned by his employer. The following day Plaintiff was
3 terminated from his employment with Advanced Home Services. Prior to being terminated, Plaintiff
4 alleges that he telephoned Defendant Petrushkin to inform him that he (Plaintiff) had received a ticket.
5 Petrushkin allegedly told Plaintiff that he would have an attorney take care of the ticket but, after
6 terminating Plaintiff, sent Plaintiff a check for \$50.00. Plaintiff did not accept the check because it was
7 not sufficient to cover the fine imposed. Plaintiff further alleges that the defendants committed acts of
8 “bad faith” by promising him that he would have a “lengthy career” with Defendant Advanced Home
9 Services only to terminate him after three weeks of employment, right after he received the ticket. He
10 alleges that another employee had crashed a vehicle three separate times but was not terminated. He
11 also alleges that another employee caused “many on-the-job floods and leaks” causing “several
12 thousand[] dollars” in damages but was not terminated.

13 Based on these allegations, Plaintiff is seeking damages, including punitive damages, for (1)
14 wrongful termination in violation of public policy, (2) wrongful termination - whistle blower, (3) bad
15 faith, and (4) intentional infliction of emotional distress. Plaintiff’s first two claims are really the same
16 claim – wrongful termination in violation of public policy– based on Plaintiff’s allegation that his
17 telling the officer that the vehicle he was driving at the time he was ticketed did not belong to him was
18 protected activity.

19 DISCUSSION

20 Because Plaintiff is proceeding *in forma pauperis*, the court must screen the complaint pursuant
21 to 28 U.S.C. § 1915(e), which provides that “the court shall dismiss the case at any time if the court
22 determines” the action or appeal is (1) frivolous or malicious, (2) fails to state a claim upon which relief
23 may be granted, or (3) seeks monetary relief against a defendant who is immune from such relief. 28
24 U.S.C. § 1915(e)(2)(B)(i)-(iii). Normally, when a court dismisses a complaint under § 1915(a), the

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26 registered or which does not have attached thereto and displayed thereon the number of plate or plates assigned
27 thereto by the Department for the current period of registration or calendar year, subject to the exemption
28 allowed in NRS 482.316 to 482.3175, inclusive, 482.320 to 482.363, inclusive, 482.385 to 482.3695, inclusive,
and 482.420.”

1 plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies,
 2 unless it is clear from the face of the complaint that the deficiencies could not be cured by amendment.
 3 *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

4 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint for
 5 failure to state a claim upon which relief can be granted. Review under Rule 12(b)(6) is essentially a
 6 ruling on a question of law. *See Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir.
 7 2000). A properly pled complaint must provide a short and plain statement of the claim showing that
 8 the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
 9 555 (2007). Although Rule 8 does not require detailed factual allegations, it demands “more than labels
 10 and conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556
 11 U.S. 662, 678 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The court must accept as
 12 true all well-pled factual allegations contained in the complaint, but the same requirement does not
 13 apply to legal conclusions. *Iqbal*, 556 U.S. at 679. Mere recitals of the elements of a cause of action,
 14 supported only by conclusory allegations, do not suffice. *Id.* at 678. Secondly, where the claims in the
 15 complaint have not crossed the line from plausible to conceivable, the complaint should be dismissed.
 16 *Twombly*, 550 U.S. at 570.

17 **1. Diversity Jurisdiction**

18 Federal district courts have original jurisdiction over civil actions in diversity cases “where the
 19 matter in controversy exceeds the sum or value of \$75,000” and where the matter is between “citizens
 20 of different states.” 28 U.S.C. § 1332. In his complaint, Plaintiff does not indicate that the matter in
 21 controversy exceeds \$75,000.00. He does, however, allege that both he and the named defendants are
 22 citizens of Nevada. Consequently, because the parties are citizens of the same state, Plaintiff has not
 23 established diversity of citizenship and the Court does not have jurisdiction under Section 1332.

24 **2. Federal Question Jurisdiction**

25 Pursuant to 28 U.S.C. § 1331, federal district courts have original jurisdiction over “all civil
 26 actions arising under the Constitution, laws, or treaties of the United States.” “A case ‘arises under’
 27 federal law either where federal law creates the cause of action or ‘where the vindication of a right
 28 under state law necessarily turn[s] on some construction of federal law.’” *Republican Party of Guam v.*

1 *Gutierrez*, 277 F.3d 1086, 1088-89 (9th Cir. 2002) (quoting *Franchise Tax Bd. v. Construction*
2 *Laborers Vacation Trust*, 463 U.S. 1, 8-9, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)). The presence or
3 absence of federal-question jurisdiction is governed by the “well-pleaded complaint rule.” *Caterpillar*,
4 *Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 963 L.Ed.2d. 318 (1987). Under the well-pleaded
5 complaint rule, “federal jurisdiction exists only when a federal question is presented on the face of the
6 plaintiff’s properly pleaded complaint.” *Id.*

7 Plaintiff’s complaint, in its current form, does not adequately allege a claim arising under
8 federal law or vindication of a right under state law that turns on an interpretation of federal law. Each
9 of the causes of action alleged is based on state law. Plaintiff’s primary claim is that he was terminated
10 in violation of public policy, which is brought under Nevada common law. *USEEOC v. Champion*
11 *Chevrolet*, 2008 WL 4167508 *3 (D. Nev.) (cause of action for wrongful termination in violation of
12 public policy is based on Nevada common law). Plaintiff’s claim for intentional infliction of emotional
13 distress also rises under Nevada law. To state a claim for intentional infliction of emotional distress, a
14 plaintiff must allege: “(1) extreme and outrageous conduct with either the intention of, or reckless
15 disregard for, causing emotional distress, (2) the plaintiff having suffered severed or extreme emotional
16 distress, and (3) actual or proximate causation.” *Scott v. Corizon Health, Inc.*, 2014 WL 1877431 (D.
17 Nev.) (citing *Starr v. Rabello*, 97 Nev. 124, 125 (1981)). To be extreme and outrageous, conduct must
18 be “outside all possible bounds of decency and is regarded as utterly intolerable in a civilized
19 community.” *Kahn v. Morse & Mowbray*, 117 P.3d 227, 237 n. 18 (Nev. 2005) (citations omitted).
20 “[P]ersons must necessarily be hardened . . . to occasional acts that are definitely inconsiderate and
21 unkind.” *Maduik v. Agency Rent-a-Car*, 953 P.2d 24, 26 (Nev. 1988) (citation omitted).

22 Plaintiff’s claim for “bad faith” is premised on the allegation that it was improper for
23 Defendants to make statements regarding Plaintiff having a lengthy career with Defendant Advanced
24 Home Services, LLC only to terminate him after three weeks. The implied covenant of good faith and
25 fair dealing exists in all contracts. *A.C. Shaw Const. v. Washoe County*, 105 Nev. 913, 914 (1989).
26 Breach of contract and bad faith discharge are not applicable to at-will employment. *Martin v. Sears*,
27 *Roebuck and Co.*, 111 Nev. 923, 929 (1995). “[A]ll employees in Nevada are presumed at-will
28 employees.” *American Bank Stationery v. Farmer*, 106 Nev. 698, 701 (1990). An employee can rebut

1 this presumption by “proving by a preponderance of the evidence that there was an express or implied
 2 contract between his employer and himself that his employer would fire him only for cause.” *Id.*
 3 However, general expressions of long term employment and subjective expectations of employment are
 4 insufficient to transform at-will employment to employment terminable only for cause.” *Martin*, 111
 5 Nev. at 929. To plead a claim for bad faith discharge in violation of the implied covenant of good faith
 6 and fair dealing, plaintiff must allege: (1) that an enforceable contract existed, (2) there was a special
 7 relationship between the tortfeasor and the tort victim, and (3) the employer’s conduct went “well
 8 beyond the bounds of ordinary liability for breach of contract.” *Id.* Plaintiff’s allegations that he was
 9 told he would have a lengthy career at Advanced Home Services, LLC are not sufficient to state a claim
 10 for bad faith discharge in violation of the implied covenant of good faith and fair dealing.

11 Construing Plaintiff’s complaint in the broadest sense possible, it could be that he is attempting
 12 to make claims under either Title VII (42 U.S.C. § 2000e *et seq.*) or a civil rights violation under 42
 13 U.S.C. § 1983. He has, however, not adequately alleged any federal claims. A claim under Section
 14 1983 or Title VII would invoke the Court’s jurisdiction under 28 U.S.C. § 1331. To state a claim under
 15 Section 1983, a plaintiff must allege that a right secured by the Constitution has been violated and the
 16 deprivation was committed by a person acting under color of state law. See, e.g., *Gibson v. U.S.*, 781
 17 F.2d 1334, 1338 (9th Cir.1986); *West v. Atkins*, 487 U.S. 42, 48 (1988); *Long v. County of Los Angeles*,
 18 442 F.3d 1178, 1185 (9th Cir.2006).

19 Here, Plaintiff alleges that Defendant Andrey Petrushkin and Defendant Advanced Home
 20 Services, LLC, may have violated his First Amendment rights by terminating his employment after he
 21 informed a police officer that the vehicle Plaintiff was driving belonged to Defendants. Generally,
 22 Section “1983 excludes from its reach merely private conduct, no matter how discriminatory or wrong.”
 23 However, a private entity may be liable under Section 1983 if the Court determines that its conduct
 24 constitutes state action. See *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th
 25 Cir.1999); see also *Perez–Morciglio v. Las Vegas Metropolitan Police Dept.*, 2011 WL 5042029, at *4
 26 (D. Nev. Oct. 25, 2011). There are four ways to find state action by a private entity for purposes of
 27 Section 1983:(1) the private actor performs a public function, (2) the private actor engages in joint
 28 activity with a state actor, (3) a private actor is subject to governmental compulsion or coercion, or (4)

1 there is a governmental nexus with the private actor. *See Kirtley v. Rainey*, 326 F.3d 1088, 1092–1094
 2 (9th Cir.2003); *see also Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950, 955 (9th Cir.2008)
 3 (quoting *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939 (1982). Plaintiff has failed to alleged
 4 any specific facts to establish that either Defendant was a state actor for purposes of Section 1983 and,
 5 therefore, has not stated a claim for relief under Section 1983.

6 Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq*, permits an individual to make claims
 7 against an employer for discrimination on the basis of race, religion, gender or national origin. A Title
 8 VII claimant must demonstrate exhaustion of EEOC administrative procedures prior to bringing a
 9 claim. Once a plaintiff files charges with the EEOC, the EEOC will investigate the charges, attempt to
 10 reach a settlement, and decide whether to sue the employer or refer the decision to sue to the Attorney
 11 General if the charges are against a state or local government entity. Exhaustion is a condition
 12 precedent to filing suit in federal court. *Martinez v. Victoria Partners*, 2014 WL 1268705 n. 17 (D.
 13 Nev.). Under Title VII, a plaintiff must typically file a charge of discrimination within 180 days of the
 14 claimed conduct, receive a right to sue letter from the EEOC, and file suit no later than 90 days after
 15 receipt of that notice. *Id*; *see also* 42 U.S.C. § 2000e-5(e). These administrative exhaustion
 16 requirements are subject to equitable remedies such as waiver, estoppel, and tolling. *Martinez*, 2014
 17 WL 1268705 *4 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)). Here, there is
 18 no indication that Plaintiff properly exhausted his administrative remedies prior to bringing his suit.² If
 19 Plaintiff chooses to file an amended complaint, he must plead exhaustion of his administrative
 20 remedies.

21 Additionally, it appears Plaintiff is attempting to sue Defendant Andrey Petrushkin in his
 22 individual capacity. Civil liability under Title VII is limited to employers. 42 U.S.C. § 2000e-5(g).
 23 Though an employer can be held liable under a respondeat superior liability theory, *Miller v. Maxwell's*
 24 *Intern. Inc.*, 991 F.2d 283, 587 (9th Cir. 1993), it is the employer who is ultimately liable for the Title
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26 ² The Court further notes that Title VII applies only an employer who has 15 or more employees. The
 27 statute defines “employer” as a person engaged in an industry affecting commerce who has fifteen or more
 28 employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar
 year, and any agent of such a person” 42 U.S.C. § 2000e(b).

VII violation. *See Christian v. Nevada Public Works Bd.*, 2009 WL 1407990 (D. Nev. 2009) (dismissing individual defendants because Title VII imposes liability only on employers, not on individual employees). Thus, any claim for liability against Defendant Andrey Petrushkin in his individual capacity under Title VII fails.

To state a claim for race discrimination under Title VII, a plaintiff must allege: (1) membership in a protected class, (2) that he was qualified for the job, (3) he suffered an adverse employment action; and (4) that the employer treated similarly situated employees outside of the protected class more favorably. *See Moran v. Selig*, 447 F.3d 748, 753 (9th Cir. 2006) (citation omitted). Plaintiff has alleged none of these elements and, therefore, has not stated claim for discrimination under Title VII. Nor has Plaintiff pled adequate facts to state a claim for Title VII discrimination based on religion, which requires pleading facts sufficient to show: (1) a bona fide religious belief, the practice of which conflicted with an employment duty, (2) the employer was aware of the religious belief and conflict, and (3) the employer threatened discriminatory conduct, including discharge, due to the conflict. *Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 681 (9th Cir. 1988) (citation omitted). Similarly, to state a prima facie case for hostile work environment in violation of Title VII, a plaintiff must show that (1) he was subjected to verbal or physical conduct of a racial or sexual nature, (2) that conduct was unwelcome, and (3) the conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment. *Vazquez v. Cty. of Los Angeles*, 349 F.3d 634 (9th Cir. 2003). Plaintiff has not sufficiently pled any facts or made any allegations that would support claims under any of the aforementioned claims under Title VII.

Ultimately, Plaintiff has not adequately pled any causes of action that would invoke the Court's authority under Section 1331. Having failed to do so, the complaint will be dismissed without prejudice. Plaintiff will be given an opportunity to file an amended complaint addressing the deficiencies identified herein. If Plaintiff elects to proceed in this action by filing an amended complaint, he is advised that the Court cannot refer to a prior pleading in order to make Plaintiff's amended complaint complete. Local Rule 15-1 requires that an amended complaint be complete in itself without reference to any prior pleading. This is because, as a general rule, an amended complaint supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once Plaintiff

1 files an amended complaint, the original pleading no longer serves any function in the case. Therefore,
2 in an amended complaint, as in an original complaint, each claim must be sufficiently alleged. In other
3 words, if Plaintiff chooses to file an amended complaint, he must restate any viable complaints
4 identified herein. Additionally, because the Court cannot tell whether Plaintiff has exhausted his
5 administrative remedies and has not pled sufficient facts to support his claims, all Title VII claims will
6 be dismissed with leave to amend.

7 Based on the foregoing and good cause appearing,

8 **IT IS HEREBY ORDERED** that Plaintiff's Application to Proceed *In Forma Pauperis* (#3) is
9 **granted.**

10 **IT IS FURTHER ORDERED** that the Clerk shall file Plaintiff's complaint (#1-1).

11 **IT IS FURTHER ORDERED** that Plaintiff's complaint is **dismissed without prejudice.**

12 **IT IS FURTHER ORDERED** that Plaintiff shall have until **Monday, September 15, 2014**, in
13 which to file an amended complaint addressing the deficiencies identified herein. Failure to do so will
14 result in a recommendation that Plaintiff's complaint be dismissed and this matter closed

15 Dated: August 5, 2014.

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18 C.W. Hoffman, Jr.
19 United States Magistrate Judge
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